



The undersigned Steering Committee of the Northern Laramie Range Alliance (NLRA), a not-for-profit citizen organization in the State of Wyoming with more than 900 members, hereby submits the following comments in connection with the deliberations of the Subcommittee on Select Revenue Measures of the Committee on Ways and Means of the U.S. House of Representatives (the "Subcommittee") respecting the Production Tax Credit for wind energy (the "Wind PTC"). We request that this submission be included in the record of the Subcommittee's April 26, 2012, Hearing on Certain Expiring Tax Provisions (the "April 26 Hearing").

### **Summary**

NLRA believes that the Wind PTC has been extremely costly for the U.S. government and taxpayers without commensurate economic or environmental benefits. Indeed, in some cases the industrial-scale facilities that the Wind PTC has subsidized have caused serious environmental damage, encumbered large areas of land and degraded both human and wildlife habitat, while producing energy erratically and inefficiently. Moreover, the Wind PTC has incentivized and enabled practices in wind energy development that are raising electricity costs to consumers and, in some cases, may be violating provisions of federal law.

Other commentators have submitted detailed and comprehensive information, with which we agree, documenting the reasons that the Wind PTC should end. In this submission we focus on aspects of the issue that have come to our attention during the course of our work in central Wyoming's Northern Laramie Range.

### **The Wind PTC Generates Little Economic Benefit**

We believe that it's important for the Congress to take a "bottom up" look at the economic impact of wind energy development, examining the real-world cases in which the Wind PTC has been applied, not the "model-based" estimates of entities such as the American Wind Energy Association (AWEA) or the National Renewable Energy Laboratory (NREL). The flawed economics of wind energy subsidies more broadly have been documented by others in presentation to the Subcommittee; we focus here on impacts locally as perceived by communities directly affected by this development..

In our area – the "wind-rich" high plains of central Wyoming just north of the town of Glenrock - there are three (four if one counts as two a PacifiCorp project permitted under separate names in 2008) recent industrial-scale wind installations. Between them, they have received cash grants under the now-expired "Section 1603" program and and/or qualified for Wind PTC benefits at a present-value cost to the federal government that we estimate to be approximately \$279 million. Based on information provided to the State of Wyoming in industrial siting applications filed by the sponsors of these projects, the combined energy-generation and job-creation characteristics are as follows:

P.O. Box 3215 • Casper, Wyoming 82602  
(307) 436-9147 or (307) 258-1713

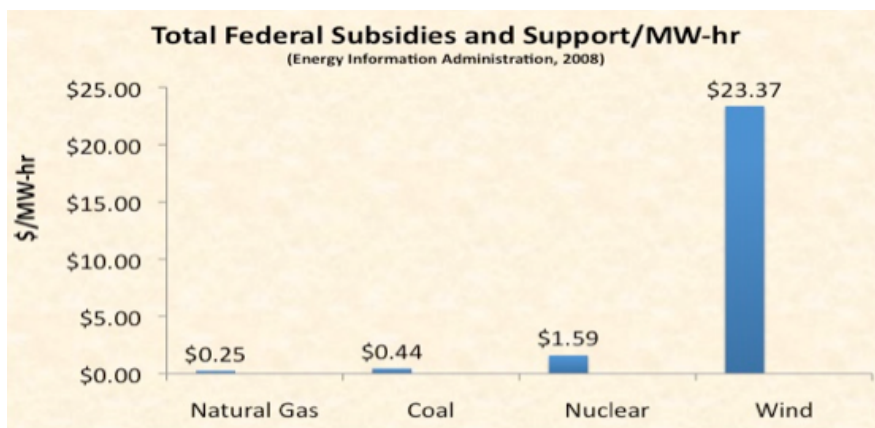
Energy Production (at estimated 35% capacity factor)	Construction Jobs (temporary - avg over 9-12 mo. construction period)	Operating jobs (permanent)	Project area acreage
175 mw	395	40	38,500

It is often claimed that these facilities also generate property and sales tax revenues for local and state government but, importantly, it must be recognized that as a part of utilities' overall expense structure these payments are simply recovered from consumers in the form of higher electricity charges.

We do not know the proportion of the equipment in these projects manufactured in the United States, but an independent study of this issue, in 2010, concluded that approximately 80% of the expenditures for this purpose funded under the Section 1603 grant program flowed to foreign manufacturers.

### Claims That Other Forms of Electricity Generation Get Subsidies at Similar Scale are Wrong

In the spring of 2010, the then-Governor of Wyoming, Dave Freudenthal, conducted a series of townhall meetings around our state. In his presentation, among other things, he remarked on the relative degree of subsidization of contributors to energy generation, a discussion even more noteworthy from this respected Democrat. The following is the slide he presented in connection with that aspect of his remarks:



### The Availability of the Wind PTC Enables and Encourages Other Dysfunctional Behavior by Some Promoters of Industrial-Scale Wind Energy Development

Just as the PTC has fostered a government-dependent segment of the financial markets focused on "harvesting" and transferring Wind PTC benefits, so too it has encouraged

Peter Nicolaysen 5/9/12 3:24 PM

**Comment [1]:** I don't know if this placement of (D) is any better...

speculators pursuing a “permit-and-flip” business model and often “gaming” the federal regulatory framework in ways that saddle consumers with higher-cost electricity.

*The “permit-and-flip” business model.* In a typical situation, an “independent” wind energy developer, often thinly financed, will “block up” development rights from one or more private and/or public landowners. The promoter then attempts to go through the pertinent local permitting process. Typically, this happens with little, if any, information to the pertinent local authorities as to the identity of the entity to which the promoter will “flip” the permitted project, often because it is only after the promoter has the permit(s) and a power purchase agreement (PPA) with the local utility that it will seek to negotiate the terms of a deal.<sup>1</sup>

*Federal securities law and promoters’ acquisition of development rights.* In typical situations, initial per-acre payments to landowners (during the period prior to the in-service date of a project) are modest (e.g., about \$6 per acre per year in our area). But the wind “lease” carries the promise of large per-turbine-per-year payments (e.g., \$12,000 and up depending on energy output) if and when the project begins producing electricity. These transactions raise obvious questions under the federal securities laws: In many cases, the development rights conveyed by the landowner are worth substantially more than the amount offered by promoters in the pre-completion phase. The difference is, in effect, the landowner’s investment of the uncompensated value of those rights in the future success of the promoter’s efforts. Under long-established precedent dating from the seminal *SEC v. Howey Co.* case in the Supreme Court, this investment is a “security” for purposes of the Securities Act of 1933 (the “Securities Act”).<sup>2</sup> Absent an applicable exemption, the promoter is required to register its offering with the SEC and provide disclosures of all material information – including, in particular, the risks of the investment – as required by the Securities Act and SEC regulation thereunder. We are not aware of any attempts by the SEC to enforce the Securities Act or associated regulations in this context.

*PURPA “gaming”.* In the ordinary course, if such a promoter seeks to sell the power generated by a proposed facility, it enters the local utility’s “interconnection queue” and then has to participate in some form of competitive pricing in order to secure a PPA on terms that protect rate-payers. But in a practice that occurs repeatedly in a number of electric utility service areas in the Western United States, however, these promoters plan and permit large industrial wind facilities and then, in order to avoid the interconnection queue and force the output of the facility onto the grid without a competitive process, put one-mile gaps between clusters of wind turbines. The promoters then claim that each cluster of turbines is a “small qualifying power production facility,” or “QF,” the output of which, under a provision of the Public Utility Regulatory Policy Act of 1978 (PURPA) must

---

<sup>1</sup> The Wyoming Legislature, quite sensibly, has recognized that the “permit-and-flip” business model is inappropriate for development of the scale and impact of industrial wind energy and has mandated that promoters show in the permitting process that they have the financial capacity to build, operate and maintain the projects for which they seek siting permits, not only – as is typical in other states – decommission and reclaim them at the end of their useful life.

<sup>2</sup> 328 U.S. 293 (1946); *see also* *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848, 95 S. Ct. 2051, 2058 (1975).

be purchased by the local public utility without regard to other, pending applications in the interconnection queue and at noncompetitive prices. Although the Federal Energy Regulatory Commission (FERC), in a 2006 rulemaking proceeding, described this behavior as “gaming” of its one-mile-separation regulation, and cautioned the industry accordingly (RM06-10-000; Order No. 688 at para. 77), it recently declined to grant an NLRA petition – supported by Xcel Energy Services, a major public utility – challenging this practice.<sup>3</sup> Suffice to say, abusive behavior of this kind would not occur but for the existence of the Wind PTC, which makes possible the business model of which PURPA “gaming” is a part.

## Conclusion

Under all of the foregoing circumstances, and in view of other information submitted to the Subcommittee in connection with the April 26 Hearing, NLRA strongly recommends that the Subcommittee recommend against renewing the Wind PTC. NLRA also requests that the Subcommittee refer to other Congressional committees with oversight of FERC and PURPA, and the federal securities law, respectively, the PURPA “gaming” practice and the potential issues under the Securities Act of 1933 described in this submission.

Finally, we want to emphasize that NLRA is not opposed to wind energy development *per se*; indeed, our organization collaborated with a wind developer in our area to avoid local action that would have interfered with a properly sited, high-plains project. But we believe that this huge infrastructure must be sited properly, developed openly, transparently and in full compliance with the law and – crucially - it must be financially self-sustaining if it is make a long-run contribution to a secure and sustainable energy future for the country. After 20 years, it’s clear that the Wind PTC is preventing – not facilitating – the industry’s meeting these essential standards.

Sincerely,

The Northern Laramie Range Alliance  
by its Steering Committee

Bret Frye	Kenneth Lay
Willard McMillan	Sharon Rodeman
Sally Sarvey	Tom Swanson
Diemer True	

Dated: May 10, 2012

---

<sup>3</sup> FERC Docket No. EL11-51-000. Xcel is challenging this practice at FERC in a separate petition relating to a “gamed” QF proposal in Oklahoma. Notably, in both cases the promoters have not disputed the facts, but instead claim that the one-mile separation test is dispositive irrespective of other circumstances.